

Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs (1965 –)

1983

Austin Hobbs v. The Denver & Rio Grande Western Railroad Company, And State of Utah, Department of Transportation : Brief of Defendant-Respondents The Denver & Rio Grande Western Railroad Company

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Alan L. Sullivan and Jeffrey E. Nelson; Attorneys for Defendant-Respondent Railroad

Recommended Citation

Brief of Respondent, *Hobbs v. Denver & Rio Grande Western Railroad*, No. 19019 (1983).
https://digitalcommons.law.byu.edu/uofu_sc2/4566

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
OF THE STATE OF UTAH

AUSTIN HOBBS,

Plaintiff-Appellant,

vs.

THE DENVER & RIO GRANDE WESTERN
RAILROAD COMPANY; and STATE OF
UTAH, DEPARTMENT OF
TRANSPORATION,

Defendants-Respondents.

Case No. 19019

BRIEF OF DEFENDANT-RESPONDENTS
THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY

Appeal From the District Court of the
Third Judicial District

Salt Lake County

Honorable J. Dennis Frederick,
District Judge

Jackson Howard
HOWARD, LEWIS & PETERSON
120 East 300 North
P.O. Box 778
Provo, Utah 84603
Attorneys for Plaintiff-Appellant

Stuart L. Poelman
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 3000
Salt Lake City, Utah 84110
Attorneys for Defendant-
Respondent State of Utah

Alan L. Sullivan
Jeffrey E. Nelson
VAN COTT, BAGLEY, CORNWALL
& McCARTHY
Suite 1600, 50 South Main
Salt Lake City, Utah 84114
Attorneys for Defendant-
Respondent Railroad

TABLE OF CONTENTS

	<u>Page</u>
NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT	2
STATEMENT OF FACTS	2
1. The Accident Scene and the Parties' Conduct . . .	2
2. The Decision to Detour Traffic to First East . . .	6
3. The Trial Court's Findings and Conclusions . . .	7
ARGUMENT	9
I. Substantial Evidence Supported the Trial Court's Finding that the Railroad's Crew Exercised Proper Care in Operating the Train . . .	10
II. Substantial Evidence Supported the Trial Court's Finding that the Railroad Exercised Proper Care in Maintaining the Railroad Crossing	12
III. Substantial Evidence Supported the Trial Court's Finding that First East was not an Extra-hazardous Crossing Requiring Additional Warning Devices	13
IV. Substantial Evidence Supported the Trial Court's Finding that Mr. Hobbs was Negligent and that his Negligence was the Sole Proximate Cause of his Accident	15
CONCLUSION	17

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Benson v. Denver and Rio Grande Western Railroad Co.,</u> 4 Utah 2d 38, 286 P.2d 790 (1955)	17
<u>Bridges v. Union Pacific Railroad Co.,</u> 26 Utah 2d 281, 488 P.2d 738 (1971)	14
<u>Curtis v. Harmon Electronics, Inc.,</u> 575 P.2d 1044 (Utah 1978)	11
<u>Garcia v. Schwendiman,</u> 645 P.2d 651 (Utah 1982)	9
<u>Gregory v. Denver & Rio Grande Western Railroad Co.,</u> 8 Utah 2d 114, 329 P.2d 407 (1958)	15
<u>Kinsey v. Kelly,</u> 312 So. 2d 461 (Fla. App. 1975)	10
<u>Lawrence v. Bamberger Railroad Co.,</u> 3 Utah 2d 247, 282 P.2d 335 (1955)	11
<u>Lundquist v. Kennecott Copper Co., Inc.,</u> 30 Utah 2d 262, 516 P.2d 1182 (1973)	11, 14, 16
<u>Mann v. Belt Railroad & Stock-Yard Co.,</u> 128 Ind. 138, 26 N.E. 819 (1891)	16
<u>Nielsen v. Chin-Hsien Wang,</u> 613 P.2d 512 (Utah 1980)	9
<u>Pippy v. Oregon Short Line R. Co.,</u> 79 Utah 439, 11 P.2d 305 (1932)	10, 11, 14
<u>Reimschiessel v. Russell,</u> 649 P.2d 26 (Utah 1982)	9
<u>Wilkinson v. Oregon Short Line R. Co.,</u> 35 Utah 110, 99 P. 466 (1909)	16

Statutes

Page

<u>Utah Code Ann.</u> § 41-6-95(a) (1981)	16
<u>Utah Code Ann.</u> § 56-1-14 (Supp. 1981)	11

NATURE OF THE CASE

This is an action for damages allegedly resulting from personal injuries that plaintiff-appellant Austin Hobbs claims to have sustained as a result of a collision with a train operated by defendant-respondent The Denver & Rio Grande Western Railroad Company (hereinafter the "Railroad") at a railroad crossing in Price, Utah.

DISPOSITION IN LOWER COURT

After a trial to the court, Judge J. Dennis Frederick of the Third Judicial District Court, Salt Lake County, found that the Railroad exercised reasonable care, complied with all applicable statutes, and was not negligent in the operation of its train or the maintenance of the railroad crossing (Record on Appeal, hereinafter "R.", at 384-86). Judge Frederick also found that the defendant-respondent State of Utah, Department of Transportation (hereinafter "DOT") exercised reasonable care and was not negligent in the choice of a detour route or in the choice of crossing warnings (R. 386). Judge Frederick found that Mr. Hobbs was negligent in failing to exercise reasonable care as he approached the crossing, in failing to comply with applicable statutory requirements, and in failing to see or hear what he could have seen or heard with the exercise of reasonable care. Judge Frederick found that Mr. Hobbs's negligence was the sole proximate cause of the accident (R. 386-87).

RELIEF SOUGHT

The Railroad seeks an order of this Court affirming the judgment of the trial court.

STATEMENT OF FACTS

The statement of facts in Mr. Hobbs's brief omits critical facts, includes other facts having virtually nothing to do with the material issues, and comes perilously close to misstating other facts about which there was no dispute at trial. In reality, the parties disagreed about little at trial other than the ultimate fact of negligence. The important facts addressed at trial, largely undisputed, were the following:

1. The Accident Scene and the Parties' Conduct

At about 10:00 p.m. on April 23, 1979, Mr. Hobbs was driving a tractor-trailer coal truck through Price, Utah, in connection with his employment (Trial Court Transcript, hereinafter "Tr.", at 483). The night was clear (Tr. 344-45, 486). Mr. Hobbs proceeded north on Price's Carbon Avenue, then followed a DOT-imposed detour by turning right (east) on Third South, then left (north) on First East toward the Railroad's crossing on First East between Second and Third South (Tr. 483-85). Five sets of tracks cross First East. As Mr. Hobbs proceeded northbound across the tracks, his truck collided with the lead engine of the Railroad's westbound train on the northernmost or "mainline" track (Tr. 342, 488).

Unquestionably the most important facts demonstrated in the trial were (1) that the Railroad's train crew properly signaled the train's approach to the First East crossing, and (2) that Mr. Hobbs had a clear view of the approaching train. The evidence on these points, summarized below, was not seriously disputed.

The train crew in the lead engine consisted of the engineer, seated on the right side of the engine, and the head brakeman and the Assistant Road Foreman of Equipment, both seated on the left side (Tr. 399). The engineer and head brakeman were both experienced employees (Tr. 358, 366). The road foreman, whose job it was to hire and supervise the Railroad's crews, accompanied the crew on the night of the accident for the purpose of observing their performance (Tr. 558-60).

On its approach to Price, the train crew lowered the speed of the train to 40 miles per hour in accordance with the applicable Price City ordinance (Tr. 563-64). On the day of the accident, the Railroad had imposed a "slow order" requiring its trains to lower their speed to 30 miles per hour at mile-post 619.0 (about 100 feet east of the First East crossing). The crew slowed the train to 30 miles per hour in accordance with this slow order (Tr. 369-70, 405-06, 564).

As it entered Price, the train had its fixed headlights, its oscillating headlights, and its bell signal in

operation (Tr. 413-18, 435-36, 563-64). As the train approached the crossing at Fourth East in Price (three blocks east of the accident crossing), the crew sounded the customary whistle signal. Soon after passing the Fourth East crossing, the engineer began sounding the whistle signal for the First East crossing (Tr. 405, 438, 565). A motorist following about a block behind Mr. Hobbs was able to see the train's lights (Tr. 124-25), and the resident of a nearby house could see the lights and hear the whistle from inside her house (Tr. 151-52).

Mr. Hobbs was familiar with the crossing. He knew that the northernmost track was the active track. He had crossed the First East crossing once before that same day and had crossed the nearby Carbon Avenue crossing two or more times per day during the six years before the accident (Tr. 510-12).

At page 5 of his brief, Mr. Hobbs asserts that as he "proceeded across the tracks, any vision he might have had down the trucks was obscured by various objects." This is not the position Mr. Hobbs took at trial and it is not supported by the evidence, including photographs of the scene offered by Mr. Hobbs's attorney. (See Exhibit P-6.) The mainline track is straight for about three-quarters of a mile to the east of the First East crossing (Tr. 589). When Mr. Hobbs approached the mainline track, he had a clear view of the approaching train for at least the last 120 feet of his travel toward the track,

cept for a period of about one second when his view of the coal engine may have been obstructed by a boxcar parked on a storage track about 120 feet east of the crossing. After passing that point, Mr. Hobbs had a clear view of the train for at least 15 seconds before he reached the mainline track (Tr. 602-06, 609-18; Exhibits D-1, D-40, and D-42 through D-54). The house, tree, and car that Mr. Hobbs referred to in his brief as being obstructions could not possibly have obscured his view of the oncoming train once he neared the crossing.

At the time of the accident, Mr. Hobbs had been driving his coal truck, a "semi" with two trailers, for more than nine hours (Tr. 471, 513). He had driven a total of about 200 miles (Tr. 116). As he approached the First East crossing from the south, he slowed his truck to about three miles per hour, but did not come to a complete stop before crossing any of the tracks (Tr. 485). It appeared to the train crew that the truck was slowing to stop, but that the truck then lurched as if Mr. Hobbs released his brakes just before reaching the mainline track (Tr. 566). A motorist following behind Mr. Hobbs's truck also noticed the truck lurch (Tr. 125). One of the crew members thought the driver of the truck had been looking in his rearview mirror just before he crossed the mainline track (Tr. 569-70). Mr. Hobbs testified that he had a "habit" of watching his trailers in his rearview mirror (Tr. 518).

When the head brakeman and road foreman realized that the truck was about to cross in front of the train, they immediately alerted the engineer, who immediately activated the emergency brake (Tr. 432, 566-68). The police officer who investigated the accident reported that Mr. Hobbs's failure to maintain a proper lookout contributed to the accident, and recommended that a traffic citation be issued to Mr. Hobbs (Tr. 64-67). The same officer determined that the train engineer's conduct was not a contributing cause of the accident (Tr. 66).

2. The Decision to Detour Traffic to First East

The Railroad's tracks also cross Carbon Avenue, which parallels First East and is the next street to the west. On the day of the accident the Carbon Avenue crossing was closed because of repair work being performed there at the direction of the DOT (Tr. 165, 217). The work was funded by State Transportation money and was performed by Railroad employees and the State's contractor (Tr. 217, 223). The purpose of the Carbon Avenue renovation was to improve the road material and the warning signals so as to accomodate the heavy coal trucks at the speed they traveled on Carbon Avenue (Tr. 175-78).

Before the construction began, the DOT called a meeting of its own officials, city officials, and Railroad representatives for the purpose of considering how to handle the construction and diversion of traffic (Tr. 190-91, 218).

Two main alternatives for diversion of traffic were a detour to the First West crossing or a detour to the First East crossing. The DOT had the ultimate responsibility for making the detour decision (Tr. 218-19). The DOT determined that the detour should go to First East for a number of reasons. There was less traffic on First East than on First West (Tr. 249-50). The housing and population of children were less dense on First East (Tr. 231). The average speed of traffic over First East was slower (Tr. 232). The turns along the First East detour route were easier to negotiate for large coal trucks (Tr. 227, 231, 533). The First East crossing was in better condition and could more easily accommodate the additional traffic (Tr. 227-28, 233). The DOT also considered the fact that the First East crossing was already equipped with warning signs and pavement markings (Tr. 201). The Railroad imposed a slow order of 30 miles per hour at the DOT's request and posted a flagman during daylight hours (Tr. 233, 338-39, 353). The DOT, which has regulatory authority over such crossings, neither ordered nor requested that the Railroad provide any additional warning at the First East crossing (Tr. 219-20).

3. The Trial Court's Findings and Conclusions

The trial court made detailed findings concerning the conduct of each of the parties and concerning the First East crossing itself. Judge Frederick found that the Railroad's

crew warned of the train's approach by activating the train's bells, whistle, and lights for the quarter mile before the First East crossing (R. 384). He found that the crew members saw Mr. Hobbs's truck approaching the crossing very slowly, and that they assumed Mr. Hobbs was about to stop. When they realized he was not going to stop, they warned the engineer who applied the train's emergency brake (R. 385). On the basis of these facts and others, the trial court concluded that the members of the crew were not negligent in the operation of the train (R. 385).

The trial court determined that the First East crossing was not extra-hazardous because Mr. Hobbs had a virtually clear view of the train for the last 120 feet before he reached the mainline track (R. 385). The trial court could find nothing in the configuration of the crossing, in the volume of traffic or otherwise that might have created an extra-hazardous condition, with the result that the Railroad had no duty to post flagmen or additional warnings (R. 386).

With regard to Mr. Hobbs, on the other hand, Judge Frederick found that he was negligent because he failed to stop, as he could have, when the approaching train was plainly visible and was emitting an audible signal (R. 386-87). In short, Mr. Hobbs "either failed to look or listen for the train or failed to heed what he saw or heard as the train approached" (R. 385).

ARGUMENT

Utah law clearly defines the respective duties of railroads and motorists in matters of crossing safety. The overwhelming weight of the evidence adduced at trial was to the effect that the Railroad met each of its obligations and in doing so exercised reasonable care. Mr. Hobbs, on the other hand, did not exercise reasonable care for his own safety. He should have stopped, looked, and listened for the oncoming train, but he did not. If he had paid even the slightest attention to the situation at the First East crossing, he would have seen the train in ample time to stop. Judge Frederick correctly held that Mr. Hobbs's negligence was the sole proximate cause of his accident and injuries.

Mr. Hobbs does not claim that the trial court made any error of law, but contests only the trial court's findings of fact. As Mr. Hobbs himself recognizes (Appellant's Brief at 12, 14), his burden on appeal is to show that the trial court's findings are "clearly against the weight of the evidence," Garcia v. Schwendiman, 645 P.2d 651, 653 (Utah 1982), and that there is "no reasonable basis in the evidence to support [the findings]." Nielsen v. Chin-Hsien Wang, 613 P.2d 512, 514 (Utah 1980). If the trial court's findings are supported by any substantial evidence, they must be upheld on appeal. Reimschiessel v. Russell, 649 P.2d 26, 27 (Utah 1982). Mr.

Hobbs is simply incorrect in arguing that this Court should impose its own allocation of negligence among the parties (see Appellant's Brief at 14-18). The cases he cites merely repeat the general rule that an appellate court is not authorized to substitute its own judgment on the issue of negligence for that of the trial court, and that a new trial on the issue will be ordered only if the record "clearly shows" that the trial court's findings were "against the manifest weight of the evidence." Kinsey v. Kelly, 312 So. 2d 461, 462 (Fla. App. 1975) (cited in Appellant's Brief at 15).

Not only did substantial evidence support Judge Frederick's findings that the Railroad was not negligent and that Mr. Hobbs's own negligence was the sole proximate cause of the accident; that conclusion was the only one that could logically have followed from the evidence. The trial court's judgment must be upheld.

I.

Substantial Evidence Supported the Trial Court's Finding that the Railroad's Crew Exercised Proper Care in Operating the Train.

The settled law in Utah is that railroads have "the unquestioned right of way" over public railroad crossings because of the momentum of trains, the confinement of their movements to the track, and the necessity and public nature of railway traffic. Pippy v. Oregon Short Line R. Co., 79 Utah

Utah 451, 11 P.2d 305, 310 (1932). Accord: Lundquist v. McClellan Copper Co., Inc., 30 Utah 2d 262, 265, 516 P.2d 1182, 1184 (1973). Railroad crew members must, of course, exercise reasonable care to avoid accidents, but they are not required to slow or stop at crossings merely because a car or truck is approaching. As this Court held in Pippy v. Oregon Short Line R. Co., supra, "Train operators may assume, until the situation otherwise discloses, that one approaching a railway track will yield precedent to the right of way and will exercise ordinary care to take care of himself" 79 Utah at 451-52, 11 P.2d at 310. And as the Court held in Lawrence v. Bamberger Railroad Co., 3 Utah 2d 247, 252, 282 P.2d 335, 338 (1955),

The motorman or engineer operating a train may assume, and act in reliance on the assumption, that a person on or approaching a crossing is in possession of his natural faculties and aware of the situation, including the fact that a train is a large and cumbersome instrumentality which is difficult to stop, and that the person will exercise ordinary care and take reasonable precautions for his own safety.

Utah law requires railroads to sound a whistle or a bell continuously for 80 rods (a quarter mile) before public crossings. Utah Code Ann. § 56-1-14 (Supp. 1981); Curtis v. Harmon Electronics, Inc., 575 P.2d 1044, 1046 (Utah 1978). Since the Railroad's crew properly sounded both the train's whistle and its bell as it approached the First East crossing, the Railroad fully discharged its statutory duty. The Railroad

had the right to assume that Mr. Hobbs would see the train's lights, hear the bell, hear the whistle, and would stop.

The trial court also correctly held that the Railroad was not negligent with regard to the design of the locomotive cab. Two crew members other than the train engineer were watching Mr. Hobbs's truck as it approached the crossing. The crew's view of the truck was not obstructed. It was only after the truck appeared to lurch toward the mainline track that the head brakeman and road foreman suspected that Mr. Hobbs did not see the train and alerted the engineer to stop. Nothing in the design of the locomotive had anything to do with the collision.

II.

Substantial Evidence Supported The Trial Court's Finding that the Railroad Exercised Proper Care in Maintaining the Railroad Crossing.

The Railroad's duty to maintain the First East crossing extended only to the area within 24 inches on either side of the tracks; the DOT or other government entities maintain the remaining area around the crossing (Tr. 311-13). The DOT was responsible for choosing the the detour route and any necessary warning signals (Tr. 217-20). Thus, insofar as Mr. Hobbs claims negligence in the choice of the detour route or warning signals, his claims must be addressed to the DOT, not the Railroad. His only claim with regard to maintenance of the

themselves is that they could be crossed at a maximum speed of only five miles per hour. If, however, Mr. Hobbs failed to see the train while he was driving at a speed of three to five miles per hour, he certainly would not have seen the train if he had been speeding across the tracks at 30 miles per hour. The fact that Mr. Hobbs was required to proceed across the tracks at a cautious speed cannot be imputed to the Railroad as negligence. In other words, Mr. Hobbs did not show at trial and cannot now logically demonstrate a causal link between the condition of the tracks and the occurrence of the accident.

III.

Substantial Evidence Supported the Trial Court's Finding that First East was not an Extra-hazardous Crossing Requiring Additional Warning Devices.

There was nothing about the First East crossing that created any duty to give warnings of the presence of the crossing or the train other than those already there. The train's lights, bells, and whistles were plainly visible and audible. Mr. Hobbs knew that the tracks were there, his view of the tracks was unobstructed, and he was further alerted to their presence by warning signs and pavement markings. All of these signs and warnings were more than adequate to alert him to the presence of the tracks and the train and to the danger in crossing the tracks.

In Utah, train tracks themselves are sufficient warning of trains and the ordinary hazards incident to their approach. Lundquist v. Kennecott Copper Co., Inc., 30 Utah 2d 262, 266, 516 P.2d 1182, 1184 (1973); Pippy v. Oregon Short Line R. Co., 79 Utah 439, 452, 11 P.2d 305, 310 (1932). Additional warnings of the possible presence of trains are not required unless something about the crossing causes it to be more than ordinarily hazardous or "extra-hazardous." Bridges v. Union Pacific Railroad Co., 26 Utah 2d 281, 283-4, 488 P.2d 738, 739 (1971). In the present case, there were no such unusual hazards. The tracks were plainly visible, and Mr. Hobbs knew they were there. The tracks were straight and flat and the approach on First East was straight and flat. Nothing obstructed a motorist's view of the tracks or of any approaching train for the last 120 feet toward the mainline track. The traffic on First East was very light at that time of night, and Mr. Hobbs admitted that he saw no other traffic at the time of accident (Tr. 529-30).

The Railroad employed a flagman at the First East crossing during business hours. Mr. Hobbs testified that he could not recall having seen the flagman when he passed the crossing on the morning of the accident, so he placed no reliance on the presence of a flagman that could impose on the Railroad any duty to maintain a flagman after the busy traffic

hours. Even if Mr. Hobbs had seen the flagman, however, that fact alone would not impose on the Railroad any duty to maintain a flagman round-the-clock, since the crossing itself was not extra-hazardous. Gregory v. Denver & Rio Grande Western Railroad Co., 8 Utah 2d 114, 117, 329 P.2d 407, 408-9 (1958).

Finally, the single boxcar located on a storage track about 120 feet east of the crossing did not create an extra-hazardous crossing. The evidence showed that Mr. Hobbs's view of the approaching train could have been obstructed for no more than one second, after which he had an additional 15 seconds in which to look and listen for the lights, bells, and whistles of the approaching train. Significantly, Mr. Hobbs testified that he could have stopped his truck within three feet if he had seen the train (Tr. 515). The overwhelming weight of the evidence was that he could have seen the train, both before and after he passed the distant boxcar, in plenty of time to stop.

IV.

Substantial Evidence Supported the Trial Court's Finding that Mr. Hobbs was Negligent and that his Negligence was the Sole Proximate Cause of his Accident.

Under Utah law, every motorist who approaches a railroad crossing has certain clearly defined duties the

violation of which is negligence as a matter of law. Section 41-6-95(a) of Utah Code Ann. (1981) provides in part:

Whenever any person driving a vehicle approaches a railroad grade crossing, the driver of such vehicle shall stop within fifty feet but not less than ten feet from the nearest track of such railroad [crossing] and shall not proceed until he can do so safely when:

* * *

(3) A railroad train approaching within approximately 1,500 feet of the highway crossing emits a signal audible from such distance and such train by reason of its speed or nearness to such crossing is an immediate hazard.

(4) An approaching train is plainly visible and is in hazardous proximity to such crossing.

Since, in the present case, the Railroad's train emitted an audible signal and was plainly visible to anyone who bothered to look from the First East crossing, Mr. Hobbs had the duty to stop his truck until he could proceed safely. "This is his duty at all times and on all occasions, whether his view be obstructed or unobstructed," and his violation of this duty is negligence as a matter of law. Lundquist v. Kennecott Copper Co., 30 Utah 2d 262, 266, 516 P.2d 1182, 1184-85 (1973). "If a traveler, by looking, could have seen an approaching train in time to escape, it will be presumed, in case he is injured by collision, either that he did not look, or, if he did look, that he did not heed what he saw. Such conduct is held negligence per se.'" Wilkinson v. Oregon Short Line R. Co., 35 Utah 110, 116, 99 P. 466, 468 (1909) (quoting Mann v. Belt

Railroad & Stock-Yard Co., 128 Ind. 138, 142, 26 N.E. 819, 820 (1891)). Accord: Benson v. Denver and Rio Grande Western Railroad Co., 4 Utah 2d 38, 42, 286 P.2d 790, 792 (1955). In other words, Mr. Hobbs was charged by law with having seen and heard what he could have seen or heard if he had exercised the proper degree of care.

The evidence at trial was undisputed that Mr. Hobbs could have seen and heard the Railroad's approaching train if he had made any effort to do so. The fixed and oscillating headlights were in operation, the train's bell was ringing, and the engineer blew the train's whistle repeatedly as the train approached the First East crossing. Witnesses who were not approaching the crossing testified that they saw and heard the train, even though they were under no duty to look out for a train. Mr. Hobbs himself admitted that he could see and hear the train just before the collision. Under these circumstances, his failure to see what could plainly have been seen and heard, and his failure to stop short of the tracks, constituted negligence per se. Substantial evidence supported the trial court's finding that Mr. Hobbs was negligent and that his negligence was the sole proximate cause of his accident.

CONCLUSION

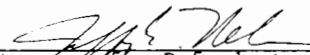
The Railroad exercised reasonable care in operating its train and in maintaining the First East crossing. Mr.

Hobbs, on the other hand, failed to exercise reasonable care in approaching the First East crossing because he failed to see the approaching train that could have been seen and heard by a reasonably cautious person exercising due care for his own safety. Since the trial court's judgment was supported by substantial evidence, the defendant Railroad respectfully requests that this Court uphold the trial court's judgment.

DATED this 20th day of October, 1983.

VAN COTT, BAGLEY, CORNWALL & MCCARTHY
Alan L. Sullivan
Jeffrey E. Nelson

By


~~Attorneys for Defendant-~~
Respondent Railroad
50 South Main Street, Suite 1600
P.O. Box 3400
Salt Lake City, Utah 84110-3400

CERTIFICATE OF SERVICE

I hereby certify that I caused two copies of the foregoing Brief to be mailed, postage prepaid, this 20th day of October, 1983, to the following:

HOWARD, LEWIS & PETERSON
Jackson B. Howard, Esq.
120 East 300 North
P.O. Box 778
Provo, Utah 84603
Attorneys for Plaintiff-Appellant

SNOW, CHRISTENSEN & MARTINEAU
Stuart L. Poelman, Esq.
10 Exchange Place, 11th Floor
P.O. Box 3000
Salt Lake City, Utah 84110
Attorneys for Defendant-
Respondent State of Utah

